LIM POH CHOO

v.

ABSOLUTE ASCEND SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[ORIGINATING SUMMONS NO: D5-24-224-2005]
1 OCTOBER 2007

COMPANY LAW: *Receivership - Appointment of receiver - Appointment of receiver by court for preserving property pending determination of a matter within court's jurisdiction under Judicature Acts - Appointment made where there is some legal or equitable right that ought to be protected and there is no other available remedy*

COMPANY LAW: *Receivership - Appointment of receivers - Company run solely by one shareholder without any supervision by Board of Directors or other shareholders - Shareholder treating company as his personal asset - Company heavily in debt - Requirements of Companies Act in respect of corporate governance ignored - Whether mismanagement may cause company to become insolvent and go into liquidation - Whether plaintiff will suffer loss if no receivers are appointed and plaintiff's action succeeds - Whether assets of company in jeopardy - Whether prima facie case for appointment of receivers made out*

COMPANY LAW: *Receivership - Duties of receiver - Receiver appointed by court is an officer of court and is responsible to court - Cannot obey directions of other parties*

COMPANY LAW: *Shares - Ownership of shares - Section 100 of Companies Act 1965 - Share certificate shall be prima facie proof of ownership of shares - Whether company not required to recognize beneficial ownership of shares*

The plaintiff was a director of the 1st defendant company and was the registered and beneficial owner of 90% of its shares. The 2nd defendant was also a director of the 1st defendant company and was the registered and beneficial owner of 10% of its shares. The 2nd defendant was also the Chairman of the 1st defendant. The plaintiff had unsuccessfully attempted to call for an Extraordinary General Meeting of the 1st defendant. The 1st defendant company had also not held an AGM since 2003. Throughout the period of these proceedings, the plaintiff had not received a single notice regarding any Directors' meeting. The plaintiff had also not

A received any report or audited accounts of the 1st defendant since 2002. The 2nd defendant, who had day to day control over the management of the 1st defendant company, had repeatedly acted without consulting the plaintiff and had repeatedly refused to allow the plaintiff access to information concerning the 1st defendant. B The plaintiff filed this application seeking, *inter alia*, appointment of the Receivers and Managers over all the property and assets of the 1st defendant and that the Receivers and Managers inquire and establish and compile a list of all assets of the 1st defendant. The dispute between the plaintiff and the 2nd defendant was in C relation to the beneficial ownership of the shares registered in the plaintiff's name.

Held (allowing the plaintiff's application with cost):

D **(1)** An appointment of receiver by the court for the object of preserving property pending the determination of a cause or matter is clearly within the jurisdiction of the court under the Judicature Acts. The appointment will be made by the courts at the instance of a shareholder where there is some legal or E equitable right that ought to be protected and there is no other available remedy adequate for that purpose. (paras 15 & 16)

(2) A receiver appointed by the court is an officer of the court put in to discharge certain duties prescribed by the order F appointing him. He is not an agent for any other person nor is he a trustee. The receiver is appointed by the order of the court and is responsible to the court, and cannot obey the directions of the parties in the action. (para 18)

G **(3)** Under art. 6 of the Articles of Association of the Company and pursuant to s. 100 of the Companies Act a share certificate shall be *prima facie* proof of the shareholders' title to the shares and a company is not required to recognize beneficiaries of shares allegedly held on trust. Therefore, until H the court made a final decision on the action between the plaintiff and the 2nd defendant, the plaintiff had a good *prima facie* claim for title to the shares. (paras 22 & 23)

(4) The 1st defendant company was being run solely by the 2nd I defendant without any supervision by the Board of Directors or the shareholders of the company. The 2nd defendant was treating the 1st defendant company as his personal asset. The 1st defendant company appeared to be heavily in debt. The

2nd defendant's action in ignoring every requirement of the Companies Act in respect of corporate governance requirements were actions which jeopardised the very existence of the company. (paras 25, 28 & 30)

(5) If the debts of the 1st defendant company became too great a burden for the company, then even if the plaintiff were to succeed in this action, then the delay in ascertaining the actual financial status of the 1st defendant company may cause the 1st defendant company to become insolvent and hence go into liquidation. If this were to happen, the plaintiff would be the one suffering the greatest loss as she held 90% of the shares in the 1st defendant company. (paras 33 & 34)

(6) The plaintiff had made out a prima act case, that the assets, properties of the 1st defendant company were in jeopardy and that the appointment of the interim Receivers and Managers would enable the present situation be retained. (para 38)

Case(s) referred to:
Bond Brewing Holdings Ltd v. National Australia Bank Ltd [1990] 1 ACSR 445 ***(refd)***
Hwang Chin Hor v. Song Seng Sdn Bhd [1990] 1 MSCLC 90 ***(refd)***
Matang Holdings Bhd & Ors v. Dato' Lee San Choon & Ors [1985] 1 LNS 42 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 100, 132C
Rules of the High Court 1980, O. 30 r. 1(1)

Other source(s) referred to:
Corporate Receivership – The law and Practice in Malaysia and Singapore, pp 383, 384

For the plaintiff - MK Yee; M/s Shearn Delamore & Co
For the defendants - S Vijayaretnam; M/s K Sila Dass & Partners

Reported by Amutha Suppayah

JUDGMENT

Ramly Ali J:

[1] Enclosure 23 is an application by Lim Poh Choo (the plaintiff in D5-24-224-2005) seeking *inter alia* the following orders:

A (a) That Mr. Ong Kong Lai and Mr. Wong Cham Mew of O & M Corporate Advisory Sdn. Bhd. be appointed as the Receivers and Managers over all the property and assets of Absolute Ascend Sdn. Bhd. (Company No. 256342-U) the 1st defendant in Suit No. D5-24-224-2005).

B (b) That the Receivers and Managers do inquire and establish and compile a list of all assets, whether moveable or immoveable owned, leased, hired, rented or in the possession of Absolute Ascend Sdn. Bhd. and to render a report to this C court within three (3) months from the date of this order or within any such period as may be extended by this court.

(c) That the Receivers and Managers be granted access to all the books, records and documents of the company to enable them to carry out their duties as set out above.

D (d) That all parties involved in the management of the company, including Lim Thian Hock @ Lim Thiam Hock, whether by themselves, their agents, servants or otherwise, do render all such assistance as the Receivers and Managers may require in E the proper and effective discharge of their duties and that they do, within fourteen (14) days from the date of this order, or within such time as the Receivers and Managers may allow, deliver to the Receivers and Managers possession, all books, records and documents of the company relating to, but F without prejudice to the generality of, the assets, properties, effects of business, monies, stock-in-trade, securities, deeds, books, documents, papers and keys to all relevant premises and containers where these items are stored.

G (e) That all parties, including the Receivers and Managers, be at liberty to apply.

(f) That the Receivers and Managers be entitled to recover his fees and all disbursements and expenses from the assets of the company not affected by prior charges after such fees, H disbursements and expenses are approved by this court.

(g) That the costs of this application be costs in the cause.

Factual Background

I **[2]** The plaintiff (Lim Poh Choo) is a director and shareholder of the 1st defendant company and is the registered and beneficial owner of 22,500 shares in the 1st defendant company, being 90% of the issued and paid-up share of the 1st defendant company.

[3] The 1st defendant is a company incorporated in Malaysia with a registered address at Suite 14.06, 14th Floor, Wisma Mirama, Jalan Wisma Putra, 50460 Kuala Lumpur.

[4] The 2nd defendant (Lim Thian Hock) is a director and shareholder of the 1st defendant company and is the registered and beneficial owner of 2,500 shares in the 1st defendant company, being 10% of the issued and paid-up shares of the 1st defendant company. The 2nd defendant is also the Chairman of the 1st defendant company.

[5] From 21 March 2005 when the plaintiff (Lim Poh Choo) attempted to call for an Extraordinary General Meeting of the 1st defendant company until today, the plaintiff has not received a single notice from the Company Secretaries of the Company, namely Premier Diversified Development Sdn. Bhd. informing the plaintiff about the date for the holding of an Annual General Meeting ("AGM") or even a date for an Extraordinary General Meeting ("EGM") of the 1st defendant company.

[6] From the records of the Companies Commission of Malaysia ("CCM") and from the 2nd defendant's own admission, the 1st defendant company has not held an AGM since 2003.

[7] In addition, throughout the period of the proceedings before this court, (since August 2005) the plaintiff has not received a single notice from the Company Secretary informing the plaintiff that there is going to be a meeting of the Directors of the 1st defendant company. The plaintiff has also to date, not received any report or audited accounts of the 1st defendant company since 2002. This is confirmed by the report from the CCM.

[8] The plaintiff has repeatedly shown and stated in the affidavits filed before this court to show that the 2nd defendant, who has day to day control over the management of the 1st defendant company, has repeatedly acted without consulting the plaintiff and has repeatedly refused to allow the plaintiff to have access to information concerning the 1st defendant company.

Relevant Law

[9] Order 30 r. 1(1) of the Rules of the High Court 1980 provides for the appointment of a receiver by the court and states that the application may be made by summons or motion.

[10] The courts have recognised that there are many circumstances under which a receiver can be appointed. The White Book (Malaysian edition) the commentary on O. 30 states:

> The circumstances under which a receiver may be appointed or have to act are so varied that it is impossible to compress them into a not without oversimplification.

[11] In *Kerr on Receivers and Administrators* (17th edn), it is stated that "A receiver has also been appointed in a company which was effectively a quasi-partnership, where one equal shareholder had presented a petition for relief based on unfair prejudice, and there was evidence that it was likely to succeed. The appointment was made to preserve the *status quo*, pending judgment on the petition".

[12] In *"Corporate Receivership – The Law and Practice in Malaysia and Singapore"* at p. 383, the writers have tried to categorise the appointment of receivers by the courts under 2 heads, namely:

(i) Appointment for the preservation of property (which include *inter alia*, a situation where there is deadlock or mismanagement of a company); and

(ii) Appointment for the enforcement of rights.

[13] The writers at pp. 383-384, then go on to state as follows:

> Many appointments of this nature, at least in respect of company property, are made pending the resolution of disputes between shareholders or directors. In cases, where the Malaysian courts have appointed receivers over the assets of a company in situations of deadlock or mismanagement, it has been said that in ordering the appointment for the interim preservation of property pending the determination of a cause or matter, the court must be satisfied as to three fundamental issues:
>
> (i) That there is a good *prima facie* claim of title by the plaintiffs;
>
> (ii) That the property is in jeopardy; and
>
> (iii) That the applicants would be in a worse position if the appointment is delayed.

[14] The writers at pp. 395-396, recognise that O. 30 of the Rules of the High Court would extend the statutory jurisdiction of the High Court to appoint receivers as well as managers and they refer to several Malaysian cases where both receivers and managers have been appointed:

> Where assets are in jeopardy and, in the circumstances of serious disputes, among the shareholders or directors, the only way in which to save a company and to ensure its continued operations being the appointment of a receiver as well as a manager, the court will readily order such an appointment to preserve the property pending the determination of disputes.

[15] An appointment for the object of preserving property pending the determination of a cause or matter is clearly within the jurisdiction of the court under the Judicature Acts. Any property may be made the subject matter of the appointment, so long as it forms a part of the subject matter of the proceedings.

[16] The appointment will be made by the courts at the instance of a shareholder where there is some legal or equitable right that ought to be protected and there is no other available remedy adequate for that purpose. This proposition has been clearly recognised by the Court of Appeal in Australia in *Bond Brewing Holdings Ltd v. National Australia Bank Ltd.* [1990] 1 ACSR 445.

[17] An appointment should be ordered if there is ample evidence to suggest that the assets of the company would be dissipated or depleted or if substantial loss would be sustained by the continued mismanagement of its property to the detriment of the plaintiff. Thus in *Hwang Chin Hor v. Song Seng Sdn Bhd* [1990] 1 MSCLC 90, 377 the court granted an application for the appointment of interim receivers and managers pending the hearing of a winding-up petition presented by the shareholders of the company, who alleged that the deputy chairman and a director of the company were siphoning funds to other companies of which they were also directors. The court ordered the interim appointment as it was satisfied that the assets were in danger of accelerated depletion in view of the presentation of the petition for the winding up of the company.

[18] A receiver appointed by the court is an officer of the court put in to discharge certain duties prescribed by the order appointing him. He is not an agent for any other person nor is he a trustee. The receiver is appointed by the order of the court and is responsible to the court, and cannot obey the directions of the

parties in the action. His appointment is made for the benefit of all parties interested in the property subject to the appointment. A court appointed receiver is allowed such proper remuneration, if any as may be fixed by the court (see O. 30 r. 3 of the RHC 1980). As such the court can stipulate the remuneration of the receiver at the time of appointment.

[19] In *Hwang Chin Hor & Ors. v. Song Seng Sdn. Bhd. & Ors* [2000] 1 MSCLC 90, 337, and *Matang Holdings Bhd. & Ors. v. Dato' Lee San Choon & Ors.* [1985] 1 LNS 42, both courts reiterated the principle that the court will make an interim order for the appointment of a receiver and manager until the company's affairs were sorted out as there were serious disputes among the shareholders and as the assets were in jeopardy if 3 issues could be established, namely:

(i) That there is a good *prima facie* claim of title by the plaintiffs;

(ii) That the property is in jeopardy; and

(iii) That the applicants would be in a worse position if the appointment is delayed.

Findings Of The Court

[20] The plaintiff has filed this application seeking very specific and limited orders with regard to the terms of appointment of the Receivers and Managers. These orders include the following:

(i) That Mr. Ong Kong Lai and Mr. Wong Cham Mew of O & M Corporate Advisory Sdn. Bhd. be appointed as the Receivers and Managers over all the property and assets of Absolute Ascend Sdn. Bhd. (Company No. 256342-U) the 1st defendant in Suit No. D5-24-224-2005).

(ii) That the Receivers and Managers do inquire and establish and compile a list of all assets, whether moveable or immoveable owned, leased, hired, rented or in the possession of Absolute Ascend Sdn. Bhd. and to render a report to this Honourable Court within three (3) months from the date of this Order or within any such period as may be extended by this Honourable Court.

(iii) That the Receivers and Managers be granted access to all the books, records and documents of the company to enable them to carry out their duties as set out in para. 1 above.

(iv) That all parties involved in the management of the company, including Lim Thian Hock @ Lim Thiam Hock, whether by themselves, their agents, servants or otherwise, do render all such assistance as the Receivers and Managers may require in the proper and effective discharge of their duties and that they do, within fourteen (14) days from the date of this order, or within such time as the Receivers and Managers may allow, deliver to the Receivers and Managers possession, all books, records and documents of the company relating to, but without prejudice to the generality of, the assets, properties, effects of business, monies, stock-in-trade, securities, deeds, books, documents, papers and key to all relevant premises and containers where these items are stored.

[21] The first issue to be detemined, based on the authorities earlier cited, is whether there is a good *prima facie* claim of title by the plaintiff.

[22] In the present case the plaintiff is the registered owner of the shares and the dispute between the plaintiff and the 2nd defendant relates to the beneficial ownership of the shares registered in the plaintiff's name. Under art. 6 of the Articles of Association of the company and pursuant to s. 100 of the Companies Act a share certificate shall be *prima facie* proof of the shareholders' title to the shares and a company is not required to recognise beneficiaries of shares allegedly held on trust.

[23] For this reason, and bearing in mind that both the plaintiff and the 2nd defendant have set out their grounds showing their claim to the shares, then until this court makes a final decision on the action between the plaintiff and the 2nd defendant, the plaintiff has a good *prima facie* claim for title to the shares.

[24] The next issue is whether the property is in jeopardy.

[25] The 2nd defendant has readily admitted that the 1st defendant company has not held its AGM since 2003 and has not filed its audited accounts with the CCM since 2002. The plaintiff has also not been informed of any meeting of the Board of Directors. This means that the 1st defendant company is actually being run solely by the 2nd defendant without any supervision by the Board of Directors or the shareholders of the company. The 2nd defendant is treating the 1st defendant company as his personal asset.

[26] The 2nd defendant has alleged that the 1st defendant's accounts for the year ending 31 December 2006 shows that the 1st defendant has liabilities of RM30,178,011.21. This is a substantial sum and under normal company law, the 1st defendant would require both directors and shareholder's approval in order to be able to enter into any transaction which would incur liabilities of this size (see s. 132C of the Companies Act 1965). The evidence shows there are no shareholders or even directors' resolution agreeing to the company incurring these liabilities.

[27] The 2nd defendant has alleged that he has loaned large sums of money to the 1st defendant company but the last audited accounts of the company do not show any loans from directors. There are no statements as to the terms under which these alleged loans are made.

[28] The 1st defendant company therefore appears to be heavily in debt and only the 2nd defendant is aware of the true financial status of the 1st defendant company. For the past year, the 2nd defendant has not been in Malaysia but has instead been living in Batam, Indonesia and in Singapore. This raises the question of whether there are any directors responsible for the day to day running of the 1st defendant company?

[29] If the debts of the 1st defendant company are allowed to increase without proper accountability and without the other directors and shareholders (apart from the 2nd defendant) being made aware of how these liabilities are incurred, how they are to be repaid, the company's cash flow position, the assets and property of the 1st defendant company are *prima facie* in jeopardy.

[30] The 2nd defendant's action in ignoring every requirement of the Companies Act in respect of corporate governance requirements (eg the holding of shareholders and directors meeting, the filing of audited accounts, obtaining shareholders' approvals for large transactions) are actions which jeopardise the very existence of the company. If the 2nd defendant truly considered the assets of the 1st defendant company as his own, he should just have either formed a business with himself as a sole proprietor or just entered into the business as an individual rather than forming a company. Now that a company has been formed, the 2nd defendant has to be made accountable and should observe all statutory requirements.

[31] The last issue to be considered is whether the applicant (Lim Poh Choo) would be in a worse position if the appointment of Receivers and Managers is delayed. A

[32] The plaintiff is the holder of 90% of the paid-up capital of the 1st defendant and on record is also a director of the 1st defendant company. Although the plaintiff is a shareholder and director of the 1st defendant company, the plaintiff has been denied access to any information regarding the management of the company and the plaintiff is kept in the dark and prevented from attending any AGM of the 1st defendant company. B C

[33] If the debts of the 1st defendant company become too great a burden for the company, then even if the plaintiff were to succeed in this action and this court were to find that the plaintiff is the legal and beneficial owner of the shares, then the delay in ascertaining the actual financial status of the 1st defendant company may cause the 1st defendant company to become insolvent and hence go into liquidation. D

[34] If this were to happen, the plaintiff would be the one suffering the greatest loss as she holds 90% of the shares in the 1st defendant company. E

[35] If this court were to allow the plaintiffs application for the appointment of Receivers and Managers the plaintiffs intention is to ask the Receivers and Managers to give a full, comprehensive and complete list of the assets and liabilities of the 1st defendant company. F

[36] If the report from the Receivers and Managers indicate that there is any evidence of mismanagement or unlawful dissipation of the assets of the 1st defendant company, the plaintiff would be able to seek further orders to preserve the *status quo* and the assets of the company pending a final decision by this court. G

[37] The terms of the order envisage that the Receivers and Managers would only be appointed for a limited period of time and based on this, the requirement for security to be provided by the Receivers and Managers would be waived as they would not be acting in a manner which would place any of the assets of the 1st defendant company in jeopardy. H I

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Conclusion

[38] Based on the evidence available for the present application, the court is satisfied that the plaintiff (Lim Poh Choo) had infact made out a prima act case, that the assets, properties of the
B 1st defendant company were in jeopardy and that the appointment of the interim Receivers and Managers would enable the present situation to be retained. The appointment of the interim Receivers and Managers would only be for a temporary period until the hearing of the petition to oversee the financial dealings of the
C company is a neutral third party. Consequently, the court allows the application by Lim Poh Choo (*vide* encl. 23) with costs.

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